UNITED STATES OF AMERICA	)	
	)	**GOVERNMENT RESPONSE TO**
v.	)	**DEFENSE SUPPLEMENT TO**
	)	**MOTION FOR JUDICIAL NOTICE**
Manning, Bradley E.	)	**AND ADMISSION OF PUBLIC**
PFC, U.S. Army,	)	**STATEMENTS**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**27 September 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny, in part, the Defense Supplement to Motion for Judicial Notice and Admission of Public Statements. The defense has repeated the same arguments it made for admission of public statements under Military Rule of Evidence (MRE) 801(d)(2)(B) and MRE 801(d)(2)(D). However, the United States does not object to the admission of the majority of the proffered statements under certain circumstances, described in detail below.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. *Manual for Courts-Martial (MCM), United States*, Rule for Courts-Martial (RCM) 905(c)(2) (2012). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

The United States stipulates to the facts set forth in ¶¶ 3 and 4 of the defense supplement.

The United States stipulates to the admissibility of the statement made by Pentagon Press Secretary Geoff Morrell and Special Envoy for Closure of the Guantanamo Detention Facility Ambassador Daniel Fried, assuming the Court finds the statement relevant and not misleading or confusing during presentencing. *See* Attachment A to the Defense Supplement. Portions of the statement qualify as an exception to hearsay under MRE 803(8)(A), specifically as the statement of the Department of Defense.

The United States stipulates to the admissibility of the statement made by President Barack Obama on 27 July 2010, assuming the Court finds the statement relevant and not misleading or confusing during presentencing. *See* Attachment B to the Defense Supplement. Portions of the statement qualify as an exception to hearsay under MRE 803(8)(A), specifically as the statement of the Office of the President.

The United States stipulates to the admissibility of the statement made by former Secretary of Defense Robert M. Gates in a letter dated 16 August 2010, assuming the Court finds the statement relevant and not misleading or confusing during presentencing. *See* Attachment C

AE 327

to the Defense Supplement. Portions of the statement qualify as an exception to hearsay under MRE 803(8)(A), specifically as the statement of the Department of Defense.

WITNESSES/EVIDENCE

The United States requests this Court consider the previous pleadings filed by the parties on this issue, Appellate Exhibits CCXXXVII (Defense Motion) and CCXXXVIII (Government Response).

LEGAL AUTHORITY AND ARGUMENT

The defense moves this Court, under multiple theories, to admit the statements of various public officials during the presentencing portion of the court-martial. For the reasons set forth below, most of the statements are not admissible during the presentencing portion of the court-martial, unless the rules of evidence are relaxed under Rule for Courts-Martial 1001(c)(3).

I. THE STATEMENTS ARE NOT ADMISSIBLE UNDER MRE 801(d)(2)(B) or 801(d)(2)(D).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Admissions by party-opponents are exempted from hearsay in five situations. *See* MRE 801(d)(2). Under MRE 801(d)(2)(B), an admission by a party-opponent is not hearsay if the statement is offered against a party and the party has manifested the party's adoption or belief in its truth. *See* MRE 801(d)(2)(B). Under MRE 801(d)(2)(D), an admission by a party-opponent is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment while the agency or employment relationship continues. *See* MRE 801(d)(2)(D).

The defense argues that the proffered statements are admissible under MRE 801(d)(2)(B) or MRE 801(d)(2)(D). *See* Def. Supp. at 4-7. In the interests of judicial economy and focusing the issues, the United States does not deny that the statements were made for the purposes of taking judicial notice. However, the defense has offered no compelling case law to support the proposition that the statements made by public officials in this case qualify as either the adoptive admission of a party-opponent under MRE 801(d)(2)(B) or the vicarious admission of a party-opponent under MRE 801(d)(2)(D).

With respect to the admissibility of the statements under MRE 801(d)(2)(B), every case cited by the defense is a variable of the same basic fact pattern—the defendant seeks to use the admission of the prosecutorial arm of the government against the prosecution in a later case. *See United States v. Morgan*, 581 F.2d 933, 938 (D.C. Cir. 1978) (holding that where the prosecution manifested its belief in the truth of an out-of-court statement, that statement could be introduced into evidence against the prosecution); *United States v. Kattar*, 840 F.2d 118, 131 (1st Cir. 1988) ("The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other courts to show the truth of the matter asserted contained therein."); *United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991)

(holding that government's jury arguments in another case should have been admitted as admissions of a party-opponent). The reasoning behind the *Morgan* line of cases is clear. If the prosecution has manifested its belief in the truth of a statement in a court proceeding or judicial document, the statement should in fairness be admissible against the government when it takes a contrary position. In this case, the prosecution has neither manifested its belief in any of these "statements," nor has any other prosecutorial entity adopted these statements in a related or unrelated matter.

As for the admissibility of the proffered statements under MRE 801(d)(2)(D), the defense relies heavily on one single district court civil case. *See* Def. Supp. at 4; *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353 (D.D.C. 1980). In *American Tel. & Tel.*, the court admitted the statements made by officials of Executive Branch agencies of the United States government at proceedings before the Federal Communications Commission (FCC) in a telephone antitrust action. *See American Tel. & Tel.*, 498 F. Supp. at 356. The court referred back to a previous opinion in the case related to discovery, wherein the court specifically found that all Executive Branch agencies, departments, and subdivisions comprised the plaintiff in the case because antitrust laws "constitute a means for protecting the economic interests of the citizens of this country, not infrequently on a national scale...." *Id.* at 357 (citing *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1333).

The defense argues that because a large number of agencies were affected by leaks occasioned by the accused, the proffered statements of government officials in various forums should be treated as the admission of an agent or servant of the *entire* government, admissible in a court of law for the truth of the matter asserted. *See* Def. Supp. at 5. The defense argument has no merit. The statements in *American Tel. & Tel.* were made by officials of Executive Branch agencies of the government at proceedings before the FCC, the federal agency specifically responsible for the regulation of interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and the U.S. territories.[1] In contrast, none of the proffered statements of officials in this case were made before any type of proceeding, judicial or otherwise. Some of the statements were made in the midst of press conferences convened to address completely unrelated topics. *See* Attachments D and E to the Defense Supplement. Others, like the statement of Representative Conyers during a hearing before the House Judiciary Committee, could hardly be characterized as a statement by an official with the ability to "bind the sovereign" as the defense asserts. Def. Supp. at 6. No court – civil or criminal – has extended MRE 801(d)(2)(D) and its federal equivalent as far as the court in *American Tel. & Tel. See, e.g.*, *Kattar*, 840 F.2d at 130-31 ("Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases...the Justice Department certainly should be considered such."). The defense argument extends even beyond the limits of *American Tel. & Tel.* because it claims all government actors, including those outside proceedings, are party-opponents. Accordingly, this Court should decline to adopt the defense argument and should adopt the position of the vast majority of courts who have examined this issue. *See* AE CCXXXVIII (discussing *United States v. Kampiles* line of cases).

---

[1] Federal Communications Commission, *at* http://www.fcc.gov/whatwedo (last visited Sep. 27, 2012).

II. PUBLISHED NEWSPAPER ARTICLES ARE NOT ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION OR THE RESIDUAL HEARSAY RULE.

The defense argues that the proffered statements, appearing in sources of news, are admissible under MRE 803(6) and MRE 807.[2] However, the defense has cited no case in which a court has admitted published newspaper articles under the business records exception to the hearsay rule. Instead, the defense cites *United States v. Reese*, in which the court approved the admission of a hospital scrapbook containing newspaper clippings under Federal Rule of Evidence 803(6). *See United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977). In *Reese*, the "business record" was not the newspapers themselves, but the hospital's scrapbook, admitted through the testimony of a hospital employee. *Id.* at 1252. As such, the case does not support the proposition that newspaper articles qualify for admission under the business records exception. Further, the Government's own research in this area generally supports the proposition that a newspaper never qualifies as an exception to hearsay under FRE or MRE 803(6). *See, e.g.*, *United States v. Baker*, 432 F.3d 1189, 1212 n.23 (11th Cir. 2005) (newspaper article regarding identity of gunmen inadmissible as double hearsay of reporter's account of what eyewitnesses stated); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (newspaper article contained double hearsay and was inadmissible); *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991) ("As the reporters never testified nor were subjected to cross-examination, their transcriptions of Gates's statements involve a serious hearsay problem."); *May v. Cooperman*, 780 F.2d 240, 262 (3d Cir. 1985) (Becker, J., dissenting on other grounds) ("Ordinarily, when offered to prove the truth of the matters stated therein, newspaper articles are held inadmissible as hearsay."). The lack of case law in this area is indicative of the simple notion that a newspaper article is more like the product of the newspaper business itself, rather than a record kept for the purpose of conducting the business.

The defense also argues that this Court should admit the newspaper articles under the residual hearsay exception. *See* Def. Supp. at 8. Like the argument for admissibility of the proffered statements under MRE 803(6), the defense relies on a single case for the proposition that newspaper articles in this case should be admitted under the MRE 807. *See id.*; *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961). Aside from the fact that the *Dallas County* case predates the federal residual hearsay exception, none of the circumstances which prompted that court to admit a newspaper article are present in this case. The court admitted the article because it was "necessary and trustworthy, relevant and material…." *Dallas County*, 286 F.2d at 398. It was the only evidence of a material fact—namely, that a fire had occurred in a church more than 50 years earlier. *Id.* Under the military's residual hearsay exception, a statement is admissible when it is trustworthy and "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through

---

[2] The defense in this section has failed to adequately address the Court's concerns with respect to the problems posed by the admission of statements within newspaper articles. The defense position, raised for the first time during oral argument at the last Article 39(a) session, appeared to be that the first level of hearsay was satisfied by the business records exception and the second level of hearsay was satisfied by the residual hearsay exception. Instead of addressing the problem posed by double hearsay, the defense simply argues that "newspaper articles" are admissible under MRE 803(6) and MRE 807. *See* Def. Supp. at 7-9.

reasonable efforts; and (C) the general purposes…and the interests of justice will best be served by admission of the statement into evidence." MRE 807.

In this case, many of the statements proffered by the defense are neither "more probative" than other available evidence of lack of damage or harm, nor relevant to damage at all. As just one example, Attachment F to the Defense Supplement contains three separate internet news articles offered to prove that Secretary Clinton stated that the State Department cables show "diplomats doing the work of diplomacy." *See* Attachment F to the Defense Supplement. Aside from the obvious issues present when each article in Attachment F quotes Secretary Clinton differently, and it is unclear whether the "reporter" was even present for the remarks, the quote is not probative of any issue relevant to presentencing. If anything, Secretary Clinton is describing the content of diplomatic cables leaked through WikiLeaks – what the cables purport to describe – rather than the lack of harm resulting from the leak of the cables in the first place. Accordingly, the newspaper articles and the proffered statements should not be admitted by this Court under MRE 807.

III. THE PROFFERED STATEMENTS ARE NOT ADMISSIBLE UNDER MRE 803(8).

The defense argues that "official press releases and reports [*sic*] Congressional hearings are admissible under M.R.E. 803(8)." Def. Supp. at 9. Although the defense does not specify which subparagraph under MRE 803(8) they are seeking to admit the proffered statements, the United States concedes that the statements made in Attachments A, B, and C to the Defense Supplement are likely admissible under MRE 803(8)(A), assuming the Court finds the statements relevant and determines that their relevance is not substantially outweighed by the danger of confusion and misleading the members. *See* MREs 401 and 403; ¶ IV *infra*. However, the proffered statements in Attachments D, E, and H[3] to the Defense Supplement are not admissible under MRE 803(8)(A) because they either do not constitute a record of the activities of a public office or agency, or they are the statement of a single individual and not representative of an entire office or agency.

Under MRE 803(8)(A), records or statements of public office or agencies, setting forth the activities of the office or agency, are admissible as an exception to hearsay. *See* MRE 803(8)(A). The rule is designed as a tool to allow into evidence public records and documents not prepared for the purposes of litigation. *United States v. Yeoman*, 22 M.J. 762, 765 (N.M.C.M.R. 1986) (citing *United States v. Stone*, 604 F.2d 922 (5th Cir. 1979). Further, under the plain language of the rule, courts considering whether to admit the records or statements of public agencies must determine whether the proffered statement is actually the statement of the public office, and whether the proffered statement sets forth the "activities of the office or agency" within the meaning of the rule. *See* MRE 803(8)(A). In this case, the statements of Secretaries Gates and Clinton in Attachments D and E, respectively, consist of responses to questions during what appear to be news conferences. *See* Attachments D and E to the Defense

[3] For the purposes of this response, the United States assumes the defense is moving for admission of only six statements under MRE 803(8) vice the other statements relevant to the motion. *See* Def. Supp. at 9 ("Statements by the President, Secretaries of Defense and State and a Congressman made at a formal committee hearing clearly fall within this exception.").

Supplement. The news conference at which Secretary Gates made his statement was convened in order to comment on the findings and recommendations of the working group formed to review the issues associated with implementing repeal of "don't ask, don't tell." *See* Attachment D to the Defense Supplement. The news conference at which Secretary Clinton made her statement was convened as part of a summit to discuss the strategic partnership between the governments of the United States and Kazakhstan. *See* Attachment E to the Defense Supplement. In short, neither statement can be characterized as a routine and non-adversarial statement of the Department of Defense or Department of State, made as part of the daily function of the respective agency. *See Yeoman*, 22 M.J. at 765. Additionally, neither statement sets forth or records the activities of the Department of Defense or the Department of State.

The proffered statement of Representative Conyers in Attachment H to the Defense Supplement is also inadmissible under MRE 803(8)(A). The defense relies upon two cases in which courts held that the press releases of public agencies were admissible under MRE 803(8). *See* Def. Supp. at 9. Notwithstanding the fact that one of the cases concerned a statement found to be admissible under MRE 803(8)(C), the statement of Representative Conyers during a House Judiciary Committee meeting can in no way be interpreted as the statement of an entire office or agency. For example, if the House Judiciary Committee released a report, and followed that report with a press release from Representative Conyers detailing the findings and recommendations, that statement might be admissible under MRE 803(8)(A). That situation is not present in this case. Further, even if this Court accepts the proposition that Representative Conyers speaks for the entire committee, his statement relevant to this case is miles away from a statement which sets forth the activities of the House Judiciary Committee. *See* Attachment H to the Defense Supplement ("Furthermore, we are too quick to accept government claims that risk the national security....").

IV. THE PROFFERED STATEMENTS ARE NOT RELEVANT UNLESS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

The defense argues that <u>all</u> the proffered statements are admissible when not offered for the truth of the matter asserted, because the statements demonstrate that the official position of the United States government was that the alleged leaks did not actually cause harm. *See* Def. Supp. at 9-10. The defense makes no attempt to distinguish the content of the proffered statements, despite the fact that several of the statements do not discuss damage or harm in any conceivable way. *See* Attachments A, B, F, and H to the Defense Supplement. Further, even if this Court accepts that the statements relate to the lack of damage or harm caused by the leaks in this case, the statements are not relevant for reasons not related to their truth. The government's official position, as asserted through public statements on the leaks, is in no way relevant to the issue of whether or not the accused's conduct actually caused or did not cause damage. In fact, that nuance would likely confuse a panel. As such, the statements not offered for their truth should be excluded on the basis that the probative value of the evidence would be substantially outweighed by the danger of confusion and misleading the members. *See* MRE 403.

V. THE MAJORITY OF THE PROFFERED STATEMENTS ARE ADMISSIBLE IF THE RULES OF EVIDENCE ARE RELAXED.

Assuming the Court finds the statements relevant during presentencing proceedings, either for their truth or for some other reason, the United States concedes that the vast majority of the statements are likely admissible if the rules of evidence are relaxed under RCM 1001(c)(3). The defense has provided additional evidence relating to the authenticity and reliability of the statements in its supplement, with the exception of the "statement" allegedly made by Secretary of State Clinton in Attachment F to the Defense Supplement. Attachment F is different because, based on the evidence provided by the defense, it is difficult to determine where a statement begins and ends, as well as whether the various articles quoted Secretary Clinton accurately. *See* Attachment F to the Defense Supplement (quoting Secretary Clinton differently in each article); *United States v. Gudel*, 17 M.J. 1075, 1077-78 ("Although hearsay evidence may, under some circumstances, be admissible during sentencing proceedings because the rules are relaxed…the hearsay evidence in this case, while relevant and material, is simply too far removed from its source to have sufficient indicia of reliability."). Accordingly, Secretary Clinton's "statement" in Attachment F to the Defense Supplement should be deemed inadmissible.

CONCLUSION

The United States respectfully requests this Court DENY, in part, the Defense Supplement to Motion for Judicial Notice and Admission of Public Statements. For the reasons stated above, the proffered statements are not admissible under the Military Rules of Evidence.

JODEAN MORROW
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 27 September 2012.

JODEAN MORROW
CPT, JA
Assistant Trial Counsel